

Workshop: Solving a case study on cross-border child abduction

Martina Erb-Klünemann

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Prepared by: THE ACADEMY OF EUROPEAN LAW

Suggested solution:

This is a case of international child abduction. This is defined as wrongful removal of the children, i.e. in breach of custody rights of Paul, which he has pursuant to the Belgian court decision (Art. 3 Hague Child Abduction Convention). The Brussels IIbis Regulation applies in conjunction with the Hague Child Abduction Convention of 1980 (which is applicable in all EU Member States).

The first step that Paul must take, is contact the Central Authority in the country where he lives. Contact details are available at:

- The European Judicial Atlas in Civil Matters:
http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_central_authorities_en.htm, or

- The website of the Hague Conference on Private International Law:
http://www.hcch.net/index_en.php?act=conventions.authorities&cid=24,

That Central Authority will tell him which documents he needs and contact the Central Authority of the country where the children are. Where necessary, the Central Authority will help to discover the whereabouts of the children (Art. 7 of the Hague Convention). The Central Authorities will try to establish the return of the children.

If the return of the children cannot be established (for instance voluntarily or through mediation), the Central Authority of the country

where the children are, will assist in the institution of legal proceedings in that country (Germany in this case). The German court will only rule on the return, and not on the merits of the dispute about where the children will reside in future. In principle the court has to order the return of the children, unless one of the limited grounds for refusal can be applied (Arts. 12, 13 and 20 of the Hague Convention). Note that the Brussels IIbis Regulation further limits these grounds for refusal (Art. 11). Read together, the court has to consider the following grounds for refusal:

1. The child has been in the country to which he or she was abducted for more than a year and the child is settled in his or her new environment;
2. The person requesting the return was not actually exercising the custody rights at the time of the abduction, or had subsequently consented in the abduction;
3. There is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, except if adequate measures to protect the child are taken in the Member State to which the child is to be returned;
4. The child was given the opportunity to be heard, unless this is inappropriate given the child's age and degree of maturity, and he or she objects to the return while it is appropriate to take account of his or her views;
5. Returning the child would be contrary to the fundamental principles (of human rights and fundamental freedoms) of the State where the return is requested.

After the return of the children, the Belgian court has jurisdiction to hear the dispute on parental responsibility, i.e. the dispute about where the children will reside. Thus, the Belgian court has retained its jurisdiction. This jurisdiction is not altered by the wrongful removal of the children (Art. 10 Brussels IIbis Regulation).

Same Case : Let us assume that the German court has refused Paul's

application.

➤ What can he do?

Suggested solution:

This depends on the ground for refusal that the German court has used. If the court has used Art. 13 of the Hague Convention (numbers 2-4 above), Paul has a second chance in Belgium, where the case on parental responsibility will be heard (Art. 11(6) and (7) Brussels IIbis Regulation). A subsequent decision by the Belgian court that requires the return of the children, is enforceable (Art. 11(8)), notwithstanding the German refusal. For this situation, the exequatur procedure has been abolished (Art. 42 and Annex IV). This means that the judgment is immediately enforceable in all other Member States, without the requirement of any approval by a court of these States. If the refusal was based on Article 12 or 20 of the Hague Convention (numbers 1 and 5 above), the so-called second chance does not exist. In these cases Germany becomes the new habitual residence of the children and proceedings on parental responsibility must be conducted there. Appeal possibilities against the refusal in Germany are determined by German national law.

Legislation:

Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1348/2000 (Brussels IIbis Regulation)

Convention on the Civil Aspects of International Child Abduction, concluded in The Hague (1980). All Member States are party to this Convention.)